RECORD AND BRIEFS

# In the Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.,

---

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.,

---

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

---

**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

**BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND UNITED STATES CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

Michael W. McConnell
*Counsel of Record*
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
michael.mcconnell@kirkland.com
(202) 879-5000

*Counsel for Amici Curiae*

Library of Congress
Law Library

May 25, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

These *amici* will address only the following question of law:

**Whether the Supremacy Clause supplies a cause of action to sue in federal court even where the underlying federal law creates neither a federal right nor a defense.**

## Table of Contents

Page

TABLE OF AUTHORITIES ..... iv

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 3

I. THE HISTORY OF THE SUPREMACY CLAUSE SHOWS THAT IT DOES NOT GRANT RESPONDENTS A CAUSE OF ACTION WHERE FEDERAL LAW DOES NOT CREATE A RIGHT ..... 3

A. The Supremacy Clause's Antecedents In The Colonial Charters Did Not Recognize Causes Of Action Where English Law Did Not Create A Right. ..... 4

1. The Colonies were required to legislate consistently with English law. ..... 5

2. Enforcement of consistency with English law did not include causes of action for colonists who did not have legal rights. ..... 7

B. The Framers Did Not Intend The Supremacy Clause To Create A Cause Of Action Where There Is No Federal Right To Enforce ..... 13

1. The records of the Constitutional Convention do not indicate that a free-

standing cause of action based on the Supremacy Clause was contemplated where federal law does not create a right. ..... 14

2. Early interpretations do not indicate that the Supremacy Clause was regarded as creating a free-standing cause of action where there is no federal right to be enforced. ..... 19

3. Historical evidence therefore leads to the inference that the Supremacy Clause was not intended to create a free-standing cause of action absent a federal right. ..... 21

II. THIS COURT HAS NOT INTERPRETED THE SUPREMACY CLAUSE AS CREATING A FREE-STANDING CAUSE OF ACTION ABSENT A FEDERAL RIGHT. ..... 22

A. Respondents' Cause Of Action Is Inconsistent With Existing Methods Of Vindicating Federal Rights And Defenses. ..... 22

B. Respondents' Cause Of Action Is Inconsistent With Existing Federal Statutory Remedies. ..... 27

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Alexander v. Sandoval*,
532 U.S. 275 (2001) ..... 23, 28

*Chapman v. Houston Welfare Rights Org.*,
441 U.S. 600 (1979) ..... 22

*Dennis v. Higgins*,
498 U.S. 439 (1991) ..... 22

*Ex parte Tyler*,
149 U.S. 164 (1893) ..... 25

*Ex parte Young*,
209 U.S. 123 (1908) ..... 24, 26

*Florida Lime & Avocado Growers, Inc. v. Paul*,
373 U.S. 132 (1963) ..... 27

*Gade v. National Solid Wastes Mgmt. Ass'n*,
505 U.S. 88 (1992) ..... 26

*Geier v. American Honda Motor Co., Inc.*,
529 U.S. 861 (2000) ..... 23

*Golden State Transit Corp. v. City of Los Angeles*,
493 U.S. 103 (1989) ..... 23

*Gonzaga Univ. v. Doe*,
536 U.S. 273 (2002) ..... 28

*Osborn v. Bank of the United States*,
22 U.S. (9 Wheat.) 738 (1824) ..... 24

*Ray v. Atlantic Richfield Co.*,
435 U.S. 151 (1978)..... 26

*Scott v. Donald*,
165 U.S. 107 (1897)..... 25

*Shaw v. Delta Air Lines, Inc.*,
463 U.S. 85 (1983) ..... 23, 24

*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*,
552 U.S. 148 (2008)..... 27, 28

*Verizon Md. Inc. v. Public Serv. Comm'n*,
535 U.S. 635 (2002)..... 26

*Virginia Office for Protection & Advocacy v. Stewart*,
131 S. Ct. 1632 (2011) ..... 24, 25, 26

*Williams v. Neely*,
134 F. 1 (1904) ..... 25

*Williamson v. Mazda Motor of Am., Inc.*,
131 S. Ct. 1131 (2011) ..... 23

**Statutes**

42 U.S.C. § 1396a(a)(30)(A)..... 27

42 U.S.C. § 1983 ..... 23, 28, 29

## Books

Bilder, Mary Sarah, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2004) ..... passim

Hamburger, Phillip, *Law and Judicial Duty* (2008)..... 8, 9, 10

Johnson, Samuel, *A Dictionary of the English Language* (6th ed. 1785)..... 6, 7

McDonald, Forrest, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985)..... 18

Pomeroy, John Norton, *A Treatise on Equity Jurisprudence as Administered in the United States of America* (5th ed. 1941) .. 25

Russell, Elmer Beecher, *The Review of American Colonial Legislation by the King in Council* (1915)..... 8

Smith, Joseph Henry, *Appeals to the Privy Council from the American Plantations* (1950)..... 11

Story, Joseph, *Commentaries on the Constitution of the United States* (1833)20, 21, 22

*The Federalist* (Clinton Rossiter ed., 1961)... 19, 20

*The Records of the Federal Convention of 1787* (Max Farrand ed., rev'd ed. 1966)..... passim

Thorpe, Francis Newton, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* (1909) ..... 5, 6, 7

Weir, David A., *Early New England: A Covenanted Society* (2005) ..... 6

**Articles**

Harrison, John, Ex Parte Young, 60 Stan. L. Rev. 989 (2008) ..... 25

Hart, Jr., Henry M., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) ..... 26

Schlesinger, Arthur M., *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. 279 (1913) ..... 10, 11

**Other Source**

Cong. Globe, 42d Cong., 1st Sess. (1871) ..... 29

## INTEREST OF *AMICI CURIAE*[1]

*Amici* — the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the International City/County Management Association, and the United States Conference of Mayors — are national organizations whose members include State, county, and municipal elected and appointed officials from across the United States. These organizations regularly file *amicus* briefs in cases that, like this one, concern federalism and raise pre-emption challenges.

In this case, the Court will decide whether the Ninth Circuit misconstrued the Supremacy Clause and expanded the scope of pre-emption under which private parties without federal rights or defenses may seek legal and equitable relief to enforce their own notions of what federal statutes require of States.

If the Ninth Circuit's opinion stands, certain discretionary decisions may be subject to lawsuit or frozen by injunction by any private party with standing that believes a State or locality has misread federal law.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* or their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

Not only would this impose new costs in dollars and time, such a free-standing cause of action would have a chilling effect on new and creative State and local solutions to dynamic fiscal and policy circumstances. For these reasons, the *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

## INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that Respondents in this case have no right of action under any federal statute. It is also undisputed that Respondents are not subject to any State enforcement action to which federal law might serve as a defense. The Court of Appeals nonetheless held that the Supremacy Clause itself supplies a cause of action, permitting plaintiffs to bring suit in federal court for pre-emption of State law in any case where they have standing. We submit that is in error. Understood in light of its history and subsequent interpretation, the Supremacy Clause is a priority rule that makes clear that, whenever a conflict between State law and federal law arises in the course of litigation, courts must give precedence to the federal law. The Supremacy Clause is not a roving commission to allow plaintiffs to seek judicial correction of perceived conflicts between State and federal law, where they personally have neither a right nor a defense under federal law.

## ARGUMENT

### I. THE HISTORY OF THE SUPREMACY CLAUSE SHOWS THAT IT DOES NOT GRANT RESPONDENTS A CAUSE OF ACTION WHERE FEDERAL LAW DOES NOT CREATE A RIGHT.

The Supremacy Clause is a solution to the inherent potential conflict in a two-tiered federal system in which the several States and the general government have overlapping authority to legislate in certain areas. As debates in the Philadelphia

Convention reveal, the Supremacy Clause was crafted as an alternative to James Madison's favored solution of a congressional "negative" on State laws, and was based on the Americans' prior experience of a kind of federalism within the British imperial system. *See* Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 11 (2004). That system allowed the colonial legislatures substantial powers of local self-government within boundaries set by British law.

The British imperial system — dubbed by historians the "transatlantic constitution" — employed two basic procedural mechanisms for ensuring that colonial law did not offend British law. Some, but not all, colonies were required to send copies of enacted statutes to London for review by the Lords of the Committee for Trade and Plantations (commonly called the "Board of Trade"), which had the power to annul colonial laws deemed repugnant to British law. *Id.* at 54-57. This was the model for Madison's "negative." In addition, parties in ordinary litigation in colonial courts could appeal to London — to the Privy Council's Committee for Hearing Appeals from the Plantations, which acted in an essentially judicial capacity — in cases of claimed repugnancy between colonial and British law. *Id.* at 73-90, 125-26. This became the model for the Supremacy Clause.

### A. The Supremacy Clause's Antecedents In The Colonial Charters Did Not Recognize Causes Of Action Where English Law Did Not Create A Right.

The concerns reflected in the Supremacy Clause were not new at the time of the Constitutional

Convention. Long before the American colonies declared their independence, the question of how to ensure consistency between a supreme central authority and peripheral legislatures was a concern of British imperial administrators. Their answers to that question are reflected in the colonial charters granted in the seventeenth and early eighteenth centuries.

### 1. The Colonies were required to legislate consistently with English law.

The transatlantic constitution permitted substantial local self-government, thus contemplating a certain amount of divergence from British legal norms. At the same time, however, colonial charters required adherence to fundamental British law and forbade the enactment and enforcement of laws "repugnant" to British law. The Second Charter of Virginia, for example, adopted in 1609, granted the colonial Council "full and absolute Power and Authority to . . . govern . . . according to such Orders, Ordinances, Constitutions, Directions, and Instructions, as by our said Council as aforesaid, shall be established[.]" *See* Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* 3801 (1909) ("*Federal & State Constitutions*").[2] That

---

[2] This charter, and the other colonial charters cited herein, is also available online through the Avalon Project at the Yale law

authority, however, came with a proviso: It would hold on condition that "the said Statutes, Ordinances and Proceedings as near as conveniently may be, be *agreeable* to the Laws, Statutes, Government, and Policy of this our Realm of England." *Id.* (emphasis added).[3]

Later colonial charters added a degree of clarity to the requirement that colonial law be "agreeable" to that of England. In most charters, that requirement evolved into the rule that colonial governments could not contradict English law. The Third Charter of Virginia, for example, required that Virginia's laws "*be not contrary to* the Laws and Statutes of this our Realm of England[.]" *Id.* at 3806 (emphasis added). The 1629 Massachusetts Bay Charter granted power to legislate so long as the laws "be not contrarie or repugnant" to English law. *See id.* at 1853.[4] The 1662 Connecticut charter granted authority to enact legislation "not Contrary to" English law, *id.* at 533; likewise the 1732 Georgia Charter required that colonial laws "be reasonable and not contrary or repugnant to the laws or statutes" of England, *id.* at

---

library. *See* http://avalon.law.yale.edu/subject_menus/statech.asp.

[3] "Agreeable," as defined by Samuel Johnson, meant "[s]uitable to; consistent with; conformable to." I Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (unpaginated) ("Johnson").

[4] An informative discussion of the development of Massachusetts and other New England colonial charters can be found in David A. Weir, *Early New England: A Covenanted Society* (2005).

770.[5] *See also, e.g.*, *id.* at 3215 (1663 Rhode Island Charter ("not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutions of the place and people there")); *id.* at 2765 (1665 Carolina Charter ("reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England")). These provisos foreshadowed our modern idea of conflict pre-emption.

In contrast to the later Supremacy Clause, not all Acts of Parliament were superior to colonial law. In general, it was thought that the "plantations" were subject to some or all of the common law that had been in effect at the time of settlement. Subsequent Acts of Parliament applied to the "plantations" only if they were expressly mentioned or if the colonies voluntarily adopted them. *See* Bilder, *The Transatlantic Constitution* at 37-39.

### 2. Enforcement of consistency with English law did not include causes of action for colonists who did not have legal rights.

Enforcement of consistency between colonial and English law was the responsibility of the English Privy Council. The Privy Council had both

---

[5] Johnson defined "contrary" as "[o]pposite; contradictory; not simply different, or not alike, but repugnant, so that one destroys or obstructs the other," or as "[i]nconsistent; disagreeing." I Johnson. "Repugnant" meant "[c]ontrary; opposite; inconsistent." II Johnson.

administrative and legal means at its disposal for that task. *See* Phillip Hamburger, *Law and Judicial Duty* 261 (2008) ("The Privy Council served as a judicial court to hear appeals from colonial courts, but it also oversaw the Empire[.]").

The principal administrative method of enforcing consistency with English law was direct review of colonial statutes, followed by approval or disallowance. Originally applied only to Royal colonies, by 1700 most colonial charters had adopted the requirement that the colonial assemblies send their laws to England for such review. *See* Bilder, *The Transatlantic Constitution* at 54-56. [6]

Review of colonial statutes from 1696 through Independence was conducted by the Lords of Trade and Plantations, usually called the Board of Trade, which advised the Privy Council on statutes sent for review. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 44 (1915). The Board of Trade would sometimes focus on colonial statutes brought to its attention by petitions from parties who claimed to be injured by them, *id.* at 50, and it gradually adopted quasi-judicial procedures for its hearings, *id.* at 51-52. But the Board of Trade was not a court; its proceedings were not strictly judicial in nature; and its

---

[6] Rhode Island lacked such a provision. The ultimate English authority over Rhode Island, in fact, was the threat that its charter would be revoked. To avert that outcome, the colonial legislature put considerable effort into ensuring that its laws would be consistent with those in England (and convincing English authorities of that consistency). Bilder, *The Transatlantic Constitution* at 57-69.

proceedings were not triggered by anything like a legal complaint and cause of action. Rather, the Board's authority was essentially political and administrative. Hamburger, *Law and Judicial Duty* at 261 (referring to the disallowment of colonial legislation as an "executive" function). Significantly (and similar to Madison's later proposal for a "negative" at the Convention), the Board was charged not only with the job of determining whether colonial legislation was consistent with English law, but whether it was expedient and consistent with the Empire as a whole. Russell, *Review of American Colonial Legislation* at 109. That was necessarily a matter not just of law, but of policy. *See, e.g., id.* at 118 (discussing the Board's role in preventing the colonies from competing with English industries); 120-21 (Board's role in regulating colonial paper currency).

Other charters provided for judicial process to ensure conformity of colonial to British law. This took the form of a right for litigants in colonial cases to appeal adverse court judgments to the Privy Council, which would protect the rights or defenses that English law conferred. The 1622 Gorges Charter, for example, provided that when the Maine colonial government was in "default" of its obligation to conform to English law, "it shall be lawful for any of the aggrieved inhabitants and planters . . . to appeal" to the Council of New England, based in Devonshire. *Federal & State Constitutions* at 1624. King Charles II's 1676 Grant of New England to the Duke of York was even more explicit. That charter, just after familiar language requiring that colonial laws "be not contrary to, but as near as conveniently may be, agreeable" to English law, added a provision

"saving and reserving to us . . . the receiving, hearing, and determining of the appeal and appeals of all or any person or persons of, in or belonging to the territories or islands aforesaid, in or touching any judgment or sentence to be there made or given." *Id.* at 2591-92. The 1681 Pennsylvania Charter was similar: It required that colonial laws "bee consonant to reason, and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the Lawes and Statutes, and rights of this Our Kingdome of England," and then reserved to the Crown "the receiving, heareing, and determining of the appeale and appeales of all or any Person or Persons, of, in, or belonging to the Territories aforesaid, or touching any Judgement to bee there made or given." *Id.* at 3038. Some sources indicate that the right to appeal to the Privy Council was considered an inherent right of the King's subjects, even without express mention in the charter, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. 279, 288 (1913), but some colonies contested the right of appeal, contending that it, along with other elements of royal prerogative, had been vested in colonial authorities by the charter. *Id.* at 293-97; *Bilder, The Transatlantic Constitution* at 73-90.

In contrast to direct review of colonial statutes by the Board of Trade, appeals were conducted by the Privy Council's Committee for Appeals, which had a judicial character. Hamburger, *Law and Judicial Duty* at 261 (referring to the hearing of appeals from colonial courts as an exercise of the Privy Council's "judicial capacity"); *see also* Bilder, *The Transatlantic Constitution* at 74 (discussing the formalization of appellate practice in the 1690s). If

the colonial court granted leave, review in the Committee was by appeal; if not, review was by petition. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 437. Litigation before the Committee was conducted by members of the bar, based on the formal record on appeal, subject to ordinary legal rules, and resulted in a legally binding judgment of either affirmance or reversal followed by a remand to the colonial court. *See* Bilder, *The Transatlantic Constitution* at 122-28; Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 437-38.

Appeals were not conceived as arising under the transatlantic constitution's "repugnancy" principle, for mere repugnancy of colonial to English law did not supply the underlying cause of action. Rather, the appeals arose in ordinary cases, which were based on ordinary causes of action implicating personal rights at admiralty, common law, or equity. "Repugnancy" served instead as an argument on the merits. *See id.* at 85-86. In other cases, English law was a defense to application of "repugnant" colonial law. *See* Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* 561 (1950).

For example, historian Arthur Schlesinger Sr. identified three Privy Council appeals of the greatest legal significance for the validity of colonial statutes: *Winthrop v. Lechmere*, *Phillips v. Savage*, and *Clark v. Tousey*. Each implicated the validity of colonial statutes, and each arose from a dispute between an heir who stood to gain from the colonial intestacy statutes and an heir who stood to receive more under the English common law rule. Schlesinger, *Colonial*

*Appeals to the Privy Council*, 28 Poli. Sci. Q. at 440-45.

In Rhode Island, the first successful private-party appeal from Rhode Island to the Privy Council involved a land dispute that ultimately turned on whether a colonial law constituting the colonial Assembly as a court of equity was repugnant to British law, which confined equity to the prerogative courts of the Crown. Bilder, *The Transatlantic Constitution* at 80-82. This resolved an important and contested question of the respective authority of colonial and royal courts, *id.* at 79, but it arose in an ordinary case about ownership of land.

Another illustrative example from Rhode Island was the litigation brought by James MacSparran, a clergyman of the Church of England, to clear title to lands set aside for support of an "orthodox" minister. The colonial court concluded that this meant, in context, the Congregationalist claimant. MacSparran appealed to the Privy Council on the ground that only a minister of the Church of England could be deemed "orthodox" under English law. The Privy Council's decision against MacSparran was an important decision restricting the reach of the established church in the colonies. *Id.* at 159-167. But despite its broad significance, the cause of action was MacSparran's mundane allegation of trespass against the lessee of a rival claimant. *Id.* at 160. In the absence of an established common law cause of action, there could have been no case, and there could have been no appeal. Neither the importance of the question nor the allegation of "repugnance" in the abstract would have sufficed.

Some charters, in short, subjected colonial laws to an English veto. Although colonists could (and did) petition English authorities for the invalidation of colonial statutes, such petitions were fundamentally political and administrative in nature, rather than judicial in the modern sense. Other charters took a judicial approach, permitting appeals to English tribunals of colonial judgments and sentences in the course of ordinary litigation. It therefore appears that although the colonies were prohibited to enact legislation conflicting with English law, that prohibition did not alter the principle that litigants can go to court for judicial relief only if they satisfy the ordinary requirements of a cause of action in law or equity.

### B. The Framers Did Not Intend The Supremacy Clause To Create A Cause Of Action Where There Is No Federal Right To Enforce.

The questions of imperial administration that appeared during the colonial period surfaced once again in designing a federal union. The Framers, in their effort to resolve the problems that plagued the United States under the Articles of Confederation, had to decide how to ensure that the States would exercise their sovereignty consistently with the Union and the federal Constitution. Both forms of imperial review described above — direct review and judicial appeal — were urged at the Convention, with explicit reference to prior British imperial practice. The Supremacy Clause's history at the Convention indicates that it was adopted as the less intrusive remedy from the point of view of the States.

Early explications of the Supremacy Clause confirm that view.

### 1. The records of the Constitutional Convention do not indicate that a free-standing cause of action based on the Supremacy Clause was contemplated where federal law does not create a right.

For the first half of the Constitutional Convention, it was assumed that the supremacy of federal law would be enforced by Congress on analogy to the post-enactment review of colonial statutes by the Board of Trade. The Virginia Plan vested the National Legislature with power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." I *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., rev'd ed. 1966) ("Farrand"). Charles Pinckney and James Madison sought to expand the negative to allow invalidation of any State law the Congress "shd. judge to be improper," thus permitting Congress to invalidate State laws on the basis of policy as well as unconstitutionality. *Id.* at 164. Both supporters and opponents of the negative drew analogies to review of colonial statutes by the Board of Trade. *See id.* (C. Pinckney) ("under the British Govt. the negative of the Crown had been found beneficial, and the States are more one nation now, than the Colonies were then."); *id.* at 168 (Madison) ("This was the practice in Royal Colonies before the Revolution"); *id.* at 337 (Lansing) (the proposed "Negative would be more injurious than that of Great Britain heretofore was"); II Farrand at 28 (Madison)

(the "utility" of the negative "is sufficiently displayed in the British System").

The Framers agreed that the Union would require some sort of federal check on State legislation inconsistent with the Constitution. The debate centered on whether that check would be best exercised on a blanket basis by Congress or by courts when the issue arose in ordinary litigation. On July 17, 1787, James Madison, the congressional negative's most important supporter, called the "power of negativing the improper laws of the States" the "most mild & certain means of preserving the harmony of the system," reminding his listeners of the "utility" of the device in the prior "British System." II Farrand at 28. Other delegates were skeptical or even hostile to this idea. Luther Martin called the negative "improper & inadmissible," on the ground that State laws should not have to be "sent up to the Genl. Legislature before they shall be permitted to operate[.]" II Farrand at 27. Even nationalist Gouvernour Morris declared that the negative would "likely be terrible to the States." II Farrand at 27. Future Chief Justice John Rutledge declared that the presence of the negative "would damn and ought to damn the Constitution." II Farrand at 391. It would bind the States "hand and foot" and make "mere corporations of them." *Id.*

Most significantly, Morris and Roger Sherman argued that a negative was unnecessary because courts would not treat a State law as valid if it came into conflict with the Constitution. *Id.* at 27, 28. Morris explained that any law that "ought to be negatived" would be "set aside" in court anyway or else "repealed by a Nationl. law." *Id.* at 28.

Sherman added that the argument for the negative rested on the false premise that State laws inconsistent with the Constitution would be valid otherwise. *Id.* at 28. In light of the familiarity to the Framers of the practice of appeals under the prior British transatlantic system, this was not a surprising reaction. Madison did not disagree, but worried that State courts could not be relied on to disregard invalid legislation as his opponents supposed. *Id.* at 27. Notwithstanding Madison's concerns, the Convention voted down the negative by seven States to three. *Id.* at 28.

It was at that point that the Convention substituted the language that, with later changes, eventually became the Supremacy Clause. That proposal passed unanimously and without recorded discussion. *Id.* at 28-29. Luther Martin, who offered the successful motion, wrote that he proposed the Supremacy Clause "in substitution of" the negative. III Farrand at 286.[7] The unmistakeable inference is that the Convention resolved the debate over how to enforce the supremacy of federal law by reliance on the judicial duty to apply federal law in cases of

---

[7] The July 17 motion borrowed the language of ¶6 of the New Jersey Plan. *See* I Farrand at 245 ("Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them . . . shall be the supreme law of the respective states so far forth as those Acts . . . shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary nonwithstanding[.]"). After subsequent changes, described below, Martin declared the final version "worse than useless." III Farrand at 287.

conflict rather than by post-enactment inspection and political review.

It is important to note that the Convention did not invest courts with a special power to enforce federal supremacy, but evidently contemplated that conflicts would arise, as they had under the prior British system, in the ordinary course of litigation. The courts' power was not conceived as the enforcement of federal mandates (although some federal statutes surely could be coercively enforced), but simply the decision as to which laws, State or federal, would prevail, and which would be void.

In its original form, as adopted on July 17, the Supremacy Clause relied on "the Judiciaries of the several States" to enforce the supremacy of federal law, presumably with appeal to the Supreme Court. II Farrand at 29. At this point, there had been no provision for creation of the lower federal courts. The July 17 version thus closely resembled the prior system of Privy Council appeals, with State courts playing the role of colonial courts, and the United States Supreme Court playing the role of the Privy Council.

The Clause underwent significant substantive revision, first by the Committee on Detail and later by the Committee on Style. According to Edmund Randolph's notes from meetings of the Committee on Detail, the Committee considered a version of the Clause stating that "All laws of a particular state, repugnant hereto, shall be void." II Farrand at 144. The draft further provided that the "decision thereon" would be "vested in the supreme judiciary." *Id.* The language of "repugnancy" harkened back to prerevolutionary colonial charters, and the term

"void" indicated the essentially negative nature of contemplated relief. The Committee, however, rejected this draft in favor of language similar to the July 17 version, but vesting decisions in "the judges in the several states," rather than "the Judiciaries of the several States," a change that entailed enforcement of the supremacy of federal law by inferior federal courts as well as by State courts. *Id.* at 183.[8] This presumably mitigated Madison's concern about reliance on State courts. A change on the floor on August 23, 1787 expanded the scope of federal supremacy beyond "Acts of the Legislature of the United States" to include *all* federal law, including the Constitution itself. *Id.* at 381-82. Lastly, the Committee on Style broadened its language to include future treaties and completed it with the "supreme law of the land" language we are familiar with today. *Id.* at 603.

In the final days of the Convention, Charles Pinckney sought to revive the congressional negative, this time with the proviso that it could be exercised only by a two-thirds vote of both houses of Congress. *Id.* at 390. Some delegates supported it. James Wilson, for example, thought that "[t]he firmness of Judges is not, of itself, sufficient" to ensure federal supremacy. *Id.* at 391. Sherman and Hugh Williamson, though, "thought it unnecessary" in light of federal legal supremacy. *Id.* at 390-91.

---

[8] By changing the language from "Judiciaries" to "judges," the Committee on Detail also made clear that judges, not juries, would decide questions of pre-emption and constitutionality. *See* Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 255 (1985).

After a short debate, this version of the negative failed as well. *Id.* at 391.

Wilson's indirect reference to the Supremacy Clause virtually sums up the Convention's debate. That courts would have a duty to "set aside" State laws inconsistent with the Constitution does not appear to have been in doubt. As shown by these debates, the Convention rejected the negative at least in part on the belief that courts would have a duty to accomplish the same end, in a less intrusive manner.

**2. Early interpretations do not indicate that the Supremacy Clause was regarded as creating a free-standing cause of action where there is no federal right to be enforced.**

Two essays of *The Federalist*, numbers 33 (Alexander Hamilton) and 44 (James Madison), analyze of the meaning of the Supremacy Clause. *The Federalist* (Clinton Rossiter ed., 1961). Neither Hamilton nor Madison specifically addressed any charge that the Supremacy Clause by itself could be used as a basis to hale States into court on an abstract pre-emption theory where there is no federal right to be enforced — though that argument surely would have been made by Anti-federalists if they had considered it possible. Instead, wrote Hamilton: "If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed." *Id.* No. 33, at 204. Otherwise, the

larger political association would "be a mere treaty . . . and not a government, which is only another word for political power and supremacy." *Id.* (emphasis omitted). For that reason, the Supremacy Clause "*only declares a truth which flows immediately and necessarily from the institution of a federal government.*" *Id.* at 205 (emphasis added).

Madison took a similar view. Because many of the existing State constitutions reserved to themselves the powers not granted to the United States under the Articles of Confederation (or, indeed, "d[id] not even expressly and fully recognize the existing powers of the Confederacy"), it was necessary to vest supreme authority in Congress. *Id.* No. 44, at 286-87. If the Constitution had (hypothetically) contained a savings clause instead, Madison observed, "the new Congress would have been reduced to the same impotent condition with their predecessors," *id.* at 286, and federal laws might even have had different application in different States, *id.* at 287.

Joseph Story, writing decades later, reached much the same conclusion. Seconding Hamilton, Story wrote that the Supremacy Clause "only declares a truth, which flows immediately, and necessarily from the institution of a national government." III Joseph Story, *Commentaries on the Constitution of the United States* § 1831, p. 694 (1833) ("Story"). "The propriety" of the Clause "would seem to result from the very nature of the constitution." *Id.* at 693. Its principle therefore would have been "necessarily implied" if it had not been in the text, *id.*, but it was "introduced from abundant caution, to make its obligation more

strongly felt by the state judges." *Id.* at § 1833, p. 697.

In explaining "Rules of Interpretation" of the Constitution, Story wrote: "Whenever the question arises, as to whom obedience is due," *i.e.*, to a State or to the federal government, "it is to be judicially settled" by the Supremacy Clause, "and being settled, it regulates, at once, the rights and duties of all the citizens." I Story at § 414, p. 397. Thus, where federal law creates a right or a defense, there is a right to judicial relief, and the Supremacy Clause establishes the rule of decision. But the Supremacy Clause is not a cause of action otherwise.

### 3. Historical evidence therefore leads to the inference that the Supremacy Clause was not intended to create a free-standing cause of action absent a federal right.

The historical evidence makes it deeply improbable that the Supremacy Clause of its own force was understood to create a federal cause of action for pre-emption even when no federal rights or defenses are at issue. Indeed, in light of the role the Supremacy Clause served at the Convention — a consensus measure when the Framers decided against comprehensive federal review of State legislation — interpreting the Clause as creating a cause of action of that sort would be quite a stretch. The Clause, after all, contemplated the resolution of State-federal legal conflicts during ordinary litigation as a substitute for a highly intrusive review of State legislation. To treat it as authorizing private lawsuits in *all* cases of arguable federal pre-

emption would replicate much of the intrusion the opponents of the negative found troubling, and that the Supremacy Clause was intended to avoid.

## II. THIS COURT HAS NOT INTERPRETED THE SUPREMACY CLAUSE AS CREATING A FREE-STANDING CAUSE OF ACTION ABSENT A FEDERAL RIGHT.

The Supreme Court's past pronouncements on the Supremacy Clause are consistent with this historical understanding. Briefly, they establish that the Supremacy Clause provides a rule for resolution of conflicts between State and federal law when they arise in the course of ordinary litigation, but it does not create the free-standing cause of action contemplated by Respondents.

### A. Respondents' Cause Of Action Is Inconsistent With Existing Methods Of Vindicating Federal Rights And Defenses.

This Court has explained that the Supremacy Clause "is not a source of *any* federal rights[.]" *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (emphasis added); *accord Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (contrasting the Supremacy Clause with the Commerce Clause). Rather, the Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Chapman*, 441 U.S. at 613. The "right," in other words, must derive either from some other provision of the Constitution itself or from federal statute. This echoes Justice Story's view that the Supremacy Clause "settle[s]" the question of federal supremacy "[w]henever [it] arises." I Story at § 414, p. 397. The question is *how*

conflicts between federal rights and State laws, resolvable through the Supremacy Clause, actually arise. Caselaw shows that absent a federal right or defense, the Supremacy Clause of its own force does not provide a cause of action.

As a general matter, federal rights "come into conflict with state law" in the context either of State enforcement of pre-empted law or the enforcement of federal rights. For example, it is elementary that when a State applies its law (including tort law) in a suit against a federally regulated entity, the defendant is free to raise federal pre-emption as an affirmative defense. *See, e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (addressing alleged pre-emption of State tort law by Federal Motor Vehicle Safety Standards); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (same). Likewise, when a federal statute such as 42 U.S.C. § 1983 provides a private cause of action for vindication of federal rights, parties holding those rights can go to court to seek affirmative relief, including injunctive or declaratory relief against pre-empted State law. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). It is undisputed in this case that Respondents have no federal rights under the statute, so these uses of the Supremacy Clause do not pertain.

Under carefully defined circumstances, parties have a right in equity to assert an anticipatory defense against the enforcement of a pre-empted State law, and to obtain relief in the form of a writ of injunction or prohibition. *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (recognizing federal court jurisdiction over a plaintiff's suit in

equity to enjoin a State regulation that infringes federal rights); *Ex parte Young*, 209 U.S. 123, 160-62 (1908). As Justice Kennedy has recently explained, the "negative injunction" available in such cases is "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring). In this case, the plaintiffs have no "defense" that they could assert in an enforcement action by the State of California. Consequently, these cases do not pertain either.

As the *Shaw* Court explained, the right to invoke the supremacy of federal law in cases of threatened enforcement of pre-empted State law is essentially an application of the equitable principles underlying *Ex parte Young*. *See Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*, 209 U.S. at 160-62).[9] Suits of this type trace their history as far back as *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and are now largely uncontroversial. Like the uses of the Supremacy Clause described above, such suits seek to assert federal constitutional or statutory rights — often, an implied federal right not to be subject to pre-empted State coercive authority — that void State enforcement proceedings. *See Ex parte Young*, 209 U.S. at 155-56. Thus, although the

---

[9] The question presented in *Ex parte Young* was not whether the plaintiff had a cause of action, but whether sovereign immunity would bar such a suit. The underlying equitable principles were not contested.

regulated party brings the lawsuit, the Supremacy Clause is still a shield dependent on a federal right or defense, not a cause of action for affirmative relief.

Historically, in fact, the type of equitable action asserted in *Shaw* could *only* be used as a shield, and the Supremacy Clause functioned only as the rule of decision. The plaintiff in *Ex parte Young* sought an anti-suit injunction under federal equity law, which supplied an equitable cause of action. *See generally* John Harrison, Ex Parte Young, 60 Stan. L. Rev. 989 (2008); *id.* at 1014. In cases like *Ex parte Young*, plaintiffs seeking such an injunction had to show (1) a legal defense (such as pre-emption) to an impending legal action and (2) an argument that waiting to assert the defense at law would not be an adequate remedy. *Id.* at 997-999, 1014; *Scott v. Donald*, 165 U.S. 107, 114 (1897) ("[T]he circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him[.]") (quoting *Ex parte Tyler*, 149 U.S. 164, 191 (1893)); *see also* IV John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1363, p. 981-83 (5th ed. 1941); *Williams v. Neely*, 134 F. 1, 4 (1904) (discussing an equity case brought to pre-emptively assert a contractual defense). Those two prerequisites have been satisfied in every case in which this Court has upheld relief based on federal supremacy, whether they have been explicitly addressed or not. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1642 (majority opinion) (plaintiff must have "a federal

right" in order to seek judicial relief under *Ex parte Young*). By contrast, Respondents in this case, lacking a federal right or defense, could not have made out such as claim.

In addition, under equity, only negative injunctive relief was permitted. The *Ex parte Young* Court emphasized that the rule it announced would not extend to offensive uses of equitable causes of action, like Respondents' effort to force States to take affirmative action to conform to federal law in the absence of a federal right. *Ex parte Young*, 209 U.S. at 158; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 516 (1954) (distinguishing between negative injunctive relief permitted by *Ex parte Young* and affirmative relief foreclosed by the Eleventh Amendment). This Court has recently reiterated that very point. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1639 (no right under *Ex parte Young* to seek specific performance of State's contract).

*Shaw* and its antecedents, therefore, support use of the Supremacy Clause by litigants with federal defenses to prospective State enforcement action, but not otherwise. The cases erroneously cited by the Ninth Circuit panel to support its more expansive reading of the Clause, to create a federal cause of action without a federal statutory right or defense, are not to the contrary. *Accord Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 640 (2002) (enforcement of State administrative ruling), *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 94 (1992) (enforcement of State licensing laws), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 (1978)

(enforcement of State oil tanker restrictions); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 134 (1963) (enforcement of State agricultural standards).

### B. Respondents' Cause Of Action Is Inconsistent With Existing Federal Statutory Remedies.

To expand the cause of action contemplated by *Ex parte Young* and *Shaw* to plaintiffs without federal rights or defenses, furthermore, would bring it into tension with the causes of action actually enacted by Congress, and with the limitations this Court has placed on implying additional statutory causes of action.

All parties, including Respondents, appear to agree that Congress did not intend 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act to create a private right of action, and that this Court's test for implying a statutory cause of action therefore is not met. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008). And yet Respondents have brought suit to enforce that provision against the State of California for their own benefit. To put the matter most starkly, all parties agree that Section 1396a does not create a private cause of action, *but Respondents are suing under it anyway*, aided by nominal reliance on the Supremacy Clause. Respondents' use of the Supremacy Clause would override the limitations this Court has properly placed on implied statutory causes of action.

The consequences would be extraordinary. Today, this Court finds implied statutory causes of

action "*only* if the underlying statute can be interpreted to disclose [congressional] intent to create one[.]" *Stoneridge*, 552 U.S. at 164-65 (emphasis added). That rule rests on the sound presumption that "[t]he decision to extend the cause of action is for Congress, not for us." *Id.* at 165. This Court's role has been "to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And in the absence of Congressional intent, this Court has held "that a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87. Respondents' theory, in contrast, would mean that *every* federal statute implicitly authorizes a private cause of action against State or local governmental defendants under the Supremacy Clause, whether it creates causes of action or affirmative defenses or not, so long as it has potentially pre-emptive effects. By limiting implied causes of action before, this Court has rejected that position, and should do so again.

Respondents' Supremacy Clause theory would also supplant much of Section 1983, which (as mentioned above) creates an injunctive remedy for violations of federal rights but not a free-standing cause of action in all instances of alleged pre-emption. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (plaintiffs may not sue under § 1983 for State violation of federal statute unless the statute creates an "unambiguously conferred right"). Virtually every suit for an injunction under Section 1983, after all, could be characterized as alleging

federal pre-emption, and under the Ninth Circuit's reasoning all a plaintiff would then need to establish is standing. Respondent's Supremacy Clause cause of action, in other words, renders a statutory cause of action and remedy almost entirely redundant.

That effect is even more striking because members of the Congress that enacted Section 1983's predecessor in 1871 evidently believed that its equitable remedies were *new*, and necessary to vindicate federal rights. Senator Frelinghuysen supported the bill on the ground that an "injured party should have an original action in our Federal courts, so that by injunction . . . he could have relief" for violations of his rights. Cong. Globe, 42d Cong., 1st Sess., at 501 (1871). Senator Carpenter said that before the Fourteenth Amendment, Congress lacked the "affirmative power" to "save the citizen from the violation of any of his rights by the State Legislatures[.]" "[T]he only remedy," he said, "was a judicial one *when the case arose*." *Id.* at 577 (emphasis added). Just as the Supremacy Clause's history indicates, vindication of federal rights had to await occasion for defensive use. As for affirmatively compelling State compliance with federal law, Representative Lowe understood it to be impossible without Section 1983: "The Federal Government cannot serve a writ of *mandamus* upon State Executives . . . to compel them to . . . protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. . . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* at 376. Even against the background of federal cases such as *Osborn*, which acknowledged an *Ex parte Young*-type action

as early as 1824, Congress understood itself to be creating a new equitable remedy that would not have existed otherwise. Respondents' argument that the same remedy was always available under the Supremacy Clause disregards this evidence of congressional intent.

The cause of action asserted by Respondents would be a departure from the Supremacy Clause's history and meaning and would radically rework the principles and authorities governing the assertion of federal supremacy against the States today. Because Respondents lack either a federal cause of action or a federal equitable right to be free of pre-empted State enforcement, federal law gives them no basis for relief.

## CONCLUSION

The Court should reverse the judgment of the United State Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Michael W. McConnell
*Counsel of Record*
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
michael.mcconnell@kirkland.com
(202) 879-5000
*Counsel for Amici Curiae*

May 25, 2011